The A. S. Abell Publishing Company and Truck Drivers and Helpers, Local Union No. 355, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 5-RC-12056

14 June 1984

DECISION ON REVIEW AND ORDER

By Chairman Dotson and Members Hunter and Dennis

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held 14-16 and 28-29 September 1983. On 18 October 1983 the Regional Director for Region 5 issued a Decision and Order dismissing the instant petition, finding that the petitioned-for district advisors are supervisors within the meaning of Section 2(11) of the Act. The Regional Director found that the individuals referred to herein as hawkers are employees of the Employer who are supervised by the district advisors and not independent contractors. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's decision, contending that the district advisors are not supervisors within the meaning of the Act because the hawkers are independent contractors and not employees of the Employer. The Employer filed a statement in opposition to the Petitioner's request for review.

By telegraphic order, dated 25 January 1984, the Board granted the Petitioner's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this proceeding and finds, in agreement with the Petitioner, that the hawkers are independent contractors and, therefore, that the district advisors are not supervisors within the meaning of the Act.

The Employer, a Maryland corporation with its principal place of business in Baltimore, publishes, circulates, and distributes The Sun, The Evening Sun, and The Sunday Sun newspapers. The petitioned-for district advisors work in the street sales section of the Employer's circulation department, which is also comprised of six other sections. There are 82 district advisors who report to 6 stipulated supervisors.

Each district advisor receives newspapers at the Employer's facility and loads them into a truck provided by the Employer. He then delivers them within a defined territory to stores, newspaper

racks, and hawkers. Each receives a salary plus a commission consisting of the difference between the wholesale price paid by the district advisor to the Employer for each newspaper and the amount paid by the store, hawker, or rack customer. Also, each district advisor receives vacation and health insurance benefits and unemployment insurance coverage.

The 172 hawkers sell newspapers to the public at places such as on street corners, in front of office buildings and churches, and in buses. A hawker's relationship with the Employer and a district advisor may commence in various ways. Thus, some contact the Employer, who gives the potential hawker's name to the district advisor in whose territory the potential hawker wishes to sell newspapers. Others contact district advisors directly. In other instances, hawkers find replacements for themselves when they decide to stop selling newspapers. In all cases, the district advisor decides whether any individual will be used as a hawker. Furthermore, district advisors may decide unilaterally to cease delivering newspapers to hawkers. There are no written agreements governing the relationship between hawkers on the one hand and district advisors or the Employer on the other.

The location at which a hawker sells newspapers appears to be determined at the time of the commencement of the district advisor-hawker relationship in most cases. For example, an individual will approach a district advisor and tell the district advisor he believes he can sell newspapers at a certain location. The district advisor then decides whether to deliver newspapers to that individual based on his assessment of the potential profitability of selling newspapers at that location. However, in a few instances, district advisors have told hawkers to change locations, for example, when subway construction changed the flow of pedestrian traffic in downtown Baltimore. Also, some hawkers who sell newspapers at intersections have been told by district advisors to stand on different corners at different times of the day in order to maximize their contact with pedestrians. On the other hand, hawkers most often are permitted to choose the corner on which they sell newspapers. Furthermore, hawkers often determine the number of newspapers delivered to them by telling the district advisors how many they believe they can sell. Although hawkers often are present when their district advisors deliver the newspapers, district advisors sometimes leave newspapers in a nearby rack if the hawker is not present at the time of delivery. Normally, district advisors meet with the hawkers at least twice a day, once to deliver the newspapers and once to collect money received from the sale

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of the newspapers. Some district advisors meet hawkers more frequently in order to deliver later editions of the newspaper. On these occasions, district advisors have an opportunity to observe the performance of the hawkers.

Also in regard to the district advisors' contact with and control over the hawkers, a stipulated supervisor testified that, when he was a district advisor 15 years prior to the hearing, he had instructed hawkers how to sell newspapers on buses, how to ensure that they had enough change before entering a bus, and how to sell to drivers of automobiles in traffic. The same supervisor also testified that currently, when district advisors are hired, he tells them to tell the hawkers "to keep sales up," "to keep their manners on the right approach for the public," to be on time, and that there should be "no goofing off, running away from the corner." Occasionally, hawkers' customers complain to the Employer about the hawkers' performance. In such cases, the Employer informs the appropriate district advisor of the complaint and the district advisor resolves the situation with the hawker. As noted above, district advisors may unilaterally cease delivering newspapers to hawkers, but no disciplinary actions short of termination of the district advisor-hawker relationship are taken, and there are no work rules.

Hawkers receive as compensation the difference between the cost per newspaper charged by the district advisors and the price at which each newspaper is sold to the public. Each hawker is given a "price card" containing the price charged by the district advisors. The price charged to the public by the hawkers is the cover price established by the Employer, with the exception of newspapers sold by hawkers to patients in hospitals, which are sold for 5 cents more than the cover price. Usually, district advisors do not charge hawkers for the newspapers when they are delivered to the hawkers. Rather, hawkers pay the district advisors from the proceeds from sales on a daily or more frequent basis, or the district advisors keep records of the number of newspapers delivered over a longer period and collect money from the hawkers less frequently. Hawkers are not required to keep or submit to the Employer any financial records and they do not pay for newspapers they are unable to sell.

Hawkers are not compensated for lost or stolen newspapers. However, most hawkers receive a territorial allowance, the purpose of which is to compensate hawkers who sell newspapers in less profitable locations. The territorial allowance consists of a payment by the Employer, the amount of which is determined by the district advisor. Territorial allowance payments range from \$1 to \$30 per week. Hawkers receive no vacation, sick leave, holiday, or unemployment compensation benefits, and no amounts are withheld from their compensation for income or social security taxes, but they appear to be covered by the Employer's workmen's compensation insurance.¹

In order to protect district advisors from losses that could be incurred if a hawker ceased selling newspapers at a time when the hawker owed money to the district advisor, and in order to encourage hawkers to continue selling the Employer's newspapers and to perform better, the Employer maintains cash bonds for many hawkers. Funds for the bonds are deducted from the territorial allowances described above² and are kept by the Employer in the name of the hawker. A hawker may withdraw portions of the bond, but only with the approval of his district advisor. The Employer keeps written records regarding the bonds and territorial allowances.

Most hawkers are permitted to sell publications of the Employer's competitors. The hawkers do not wear uniforms and there is no dress code. Most do not wear any articles of clothing bearing the Employer's insignia, but some wear buttons, hats, shirts, or coin aprons with the Employer's insignia. Hawkers have no proprietary interest in the areas in which they sell newspapers, and their relationship with the Employer and the district advisors requires no investment of money.

As noted above, the Regional Director found that the hawkers are employees of the Employer and that the district advisors who use hawkers are supervisors of the hawkers. Relying on the evidence that the district advisors control the hiring, training, and location of the hawkers as well as the manner in which they sell newspapers, and also relying on the evidence that the district advisors are involved in resolving customer complaints about hawkers, the Regional Director concluded that the

¹ The record is unclear regarding the issue of whether the hawkers are covered by the Employer's workmen's compensation insurance. Thus, although hawkers are not listed as a covered employee classification in the Employer's workmen's compensation insurance policy, the Employer's assistant director of circulation testified that hawkers and home delivery carriers jointly are referred to as "newsboys" in the policy. Furthermore, the record contains evidence regarding only one claim by a hawker or a hawker's family for workmen's compensation benefits. In that case, the Employer appears to have taken the position at the time the claim was made that the family of the deceased hawker was not entitled to such benefits because the hawker was an independent contractor, but the State Workmen's Compensation Commission ruled that he was an employee. The commission awarded benefits to the hawker's widow, and there is evidence that benefits were paid to her by the Employer's insurance company.

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² Some hawkers' bonds may consist of money withheld from the hawkers' profits by the district advisors, but the record is not clear on this point.

Employer controls the manner and means by which newspapers are sold by the hawkers.³ Accordingly, and inasmuch as the Petitioner is not willing to proceed to an election in a unit consisting only of the district advisors who do not use hawkers, the Regional Director dismissed the petition. For the following reasons, we disagree with the Regional Director and we shall reinstate the petition.

The Board applies a "right of control" test when determining the status of persons alleged to be independent contractors. If the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the person who performs the service is an employee. If only the results are controlled, the person performing the services is an independent contractor. The Board's determination of which type of control is retained by the alleged employer turns on the particular facts of each case.

In this case, as is typical in most cases involving similar issues of employee-independent contractor status, there are factors present that support the position of each party. Thus, in the instant case, factors tending to support a finding of employee status include the open-ended duration of the hawkers' relationship with the Employer, the Employer's unilateral determination of the wholesale and retail prices, the lack of any proprietary interest or investment by the hawkers, and the absence of any risk of loss resulting from unsold newspapers. Also, the Employer's control of the hawkers is indicated by the district advisors' role in the commencement and termination of the hawkers' involvement with the Employer's product, the district advisors' determination of the location at which some hawkers sell newspapers, and their handling of customer complaints regarding the hawkers' performance. In addition, the Employer itself exercises some control over the hawkers by granting territorial allowances, maintaining cash bonds for the hawkers, and keeping records of both. However, on closer examination, many of these factors are of little probative value. For example, the district advisors' involvement in training the hawkers, determining the hawkers' locations, and handling customer complaints regarding the hawkers is infrequent; for the most part, the district advisors' contact with the hawkers is limited to the delivery of newspapers and the collection of money. As for the Employer's payment of territorial allowances and its maintenance of cash bonds, although these facts show

some exercise of control by the Employer over the hawkers, we note that these financial arrangements are quite different from those usually found in employment relationships.

On balance, we conclude that the indicia of employee status noted above are outweighed by the factors supporting a finding that the hawkers are independent contractors. First, and most significant, most hawkers are permitted to sell the publications of the Employer's competitors, and many do so. Also, the major portion of the income of most hawkers, and the only income of many hawkers, is the profit made on the sale of newspapers. The amount of their income therefore depends on the number of newspapers they sell which, in turn, depends on their own efforts to increase sales and their own determination of the number of newspapers delivered to them. The hawkers also bear the risk of loss resulting from any lost or stolen newspapers. Also with regard to their compensation, the Employer withholds no income or social security taxes and grants no benefits to the hawkers. As for the Employer's control over the hawkers, most of the hawkers' activities are not directly supervised or even observed by the district advisors or any official of the Employer, there are no work rules or dress codes, and most hawkers wear no employer insignia.

Based on the foregoing, we find that the Employer does not control the manner and means by which the hawkers' selling of newspapers is accomplished and that the record establishes that the hawkers are independent contractors. In so finding, we emphasize particularly that, with the exception of territorial allowances that are paid to most but not all hawkers, it is clear that the hawkers' income derived from their sale of the Employer's newspapers consists of the difference between the price paid to them by customers and the price they pay their district advisors, minus the wholesale value of any lost or stolen newspapers.⁵ Also significant to our finding of independent contractor status is the ability of most hawkers to sell publications of the Employer's competitors. Furthermore, there is no direct supervision during much of the time when hawkers are selling newspapers, and hawkers have discretion regarding where they locate themselves in most cases. Accordingly, contrary to the Regional Director, we conclude that the hawkers are independent contractors and not employees within the meaning of Section 2(3) of the Act 6 and, con-

³ In so concluding, the Regional Director relied on Oakland Press Co., 249 NLRB 1081 (1980); Philadelphia Newspapers, 238 NLRB 835 (1978); and A. S. Abell Co., 185 NLRB 144 (1970).

^{*} Fort Wayne Newspapers, 263 NLRB 854 (1982).

⁵ See Fort Wayne Newspapers, supra.

⁶ We find the cases relied on by the Regional Director to be factually distinguishable. The individuals alleged to be independent contractors, and whom the Board found to be employees in Oakland Press, supra;

sequently, that the district advisors are not supervisors within the meaning of Section 2(11) of the Act because they do not supervise employees.

Accordingly, we shall reinstate the petition and remand this case to the Regional Director for further processing.⁷

Philadelphia Newspapers, supra; and A. S. Abell Co., supra, were home delivery carriers with specified routes for the delivery of newspapers to the homes of subscribers, and not, as in the instant case, hawkers who sell to the general public. Also, the facts in those cited cases established significantly more control by the employers over the manner and means by which the carriers accomplished the result of home delivery than the control exercised by the Employer over the hawkers in the instant case.

⁷ In dismissing the petition on the ground that the district advisors are supervisors, the Regional Director also noted that the Employer had raised the alternative argument that if the district advisors were found to be employees the requested unit is inappropriate because it excludes cer-

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The petition is reinstated and the case is remanded to the Regional Director for further appropriate

tain other employees. However, the Regional Director did not reach the unit scope issue in his Decision and Order. The Employer did not request review of the Regional Director's failure to reach the issue, but it does contend, in its statement in opposition to the Petitioner's request for review, that a unit limited to district advisors would be inappropriate. In these circumstances, we deem it appropriate to remand the case to the Regional Director for a decision on the unit scope issue absent agreement by the parties.